

Chapter 4

LEGAL POSITIVISM

A. AN OVERVIEW OF LEGAL POSITIVISM

Legal positivism is based on the simple assertion that the proper description of law (legal systems and legal norms) is a worthy objective, and a task that needs to be kept separate from moral judgments (regarding the value of the present law, and regarding how the law should be developed or changed). In the more precise terms of theorizing about law, it is the view that a descriptive, conceptual or at least morally neutral theory of law is both possible and valuable. Early advocates of legal positivism included Jeremy Bentham (1748–1832) and John Austin (1790–1859). One could also dig deeper, and place the roots of modern legal positivism with the philosophers and political theorists Thomas Hobbes (1588–1679) and David Hume (1711–1776). In simple terms, legal positivism is built around the belief, the assumption, the dogma, that the question of what is the law is separate from, and must be kept separate from, the question of what the law should be. The position can be summarized in Austin's words (which are also quoted in the selection from H.L.A. Hart, which follows):

The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation.¹

Legal positivism seeks from the study of law nothing more and nothing less than what is considered the foundation of modern social theory: that social institutions can be studied in an objective fashion, free from bias or ideology. Such separation does not deny — in fact, theorists advocating legal positivism usually strenuously assert — that something identified as “a valid law” or “a valid legal system” may sometimes be sufficiently evil or unjust that it should not be obeyed.

The early legal positivists, Austin and Bentham, offered a “command theory” of law, equating law with the orders of a country's sovereign (“order” and “sovereign” both to be understood broadly).² Later legal positivists rejected the command theory, with H.L.A. Hart (1907–1992), in particular, developing his theory around his criticisms of Austin's work.

¹ JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED*, LECTURE V, 157 (W.E. Rumble ed. 1995) (1832).

² For more on Austin and his command theory, see Brian Bix, *John Austin*, *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., 2014), <http://plato.stanford.edu/entries/austin-john/>.

B. H.L.A. HART

H.L.A. Hart, *Positivism and the Separation of Law and Morals* 71 HARV. L. REV. 593, 593-629 (1958)*

In this article I shall discuss and attempt to defend a view which Mr. Justice Holmes, among others, held and for which he and they have been much criticized. But I wish first to say why I think that Holmes, whatever the vicissitudes of his American reputation may be, will always remain for Englishmen a heroic figure in jurisprudence. This will be so because he magically combined two qualities: one of them is imaginative power, which English legal thinking has often lacked; the other is clarity, which English legal thinking usually possesses. The English lawyer who turns to read Holmes is made to see that what he had taken to be settled and stable is really always on the move. To make this discovery with Holmes is to be with a guide whose words may leave you unconvinced, sometimes even repelled, but never mystified. Like our own Austin, with whom Holmes shared many ideals and thoughts, Holmes was sometimes clearly wrong; but again like Austin, when this was so he was always wrong clearly. This surely is a sovereign virtue in jurisprudence. Clarity I know is said not to be enough; this may be true, but there are still questions in jurisprudence where the issues are confused because they are discussed in a style which Holmes would have spurned for its obscurity. Perhaps this is inevitable: jurisprudence trembles so uncertainly on the margin of many subjects that there will always be need for someone, in Bentham's phrase, "to pluck the mask of Mystery" from its face.¹ This is true, to a pre-eminent degree, of the subject of this article. Contemporary voices tell us we must recognize something obscured by the legal "positivists" whose day is now over: that there is a "point of intersection between law and morals,"² or that what *is* and what *ought* to be are somehow indissolubly fused or inseparable, though the positivists denied it. What do these phrases mean? Or rather which of the many things that they *could* mean, *do* they mean? Which of them do "positivists" deny and why is it wrong to do so?

I.

I shall present the subject as part of the history of an idea. At the close of the eighteenth century and the beginning of the nineteenth the most earnest thinkers in England about legal and social problems and the architects of great reforms were the great Utilitarians. Two of them, Bentham and Austin, constantly insisted on the need to distinguish, firmly and with the maximum of clarity, law as it is from law as it ought to be. This theme haunts their work, and they condemned the natural-law thinkers precisely because they had blurred this apparently simple but vital distinction. By contrast, at the present time in this country and to a lesser extent in England, this separation between law and morals is held to be superficial and

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¹ Bentham, *A Fragment on Government*, in 1 WORKS 221, 235 (Bowring ed. 1859) (preface, 41st para.).

² D'ENTREVES, *NATURAL LAW* 116 (2d ed. 1952).

wrong. Some critics have thought that it blinds men to the true nature of law and its roots in social life. Others have thought it not only intellectually misleading but corrupting in practice, at its worst apt to weaken resistance to state tyranny or absolutism, and at its best apt to bring law into disrespect. The nonpejorative name "Legal Positivism," like most terms which are used as missiles in intellectual battles, has come to stand for a baffling multitude of different sins. One of them is the sin, real or alleged, of insisting, as Austin and Bentham did, on the separation of law as it is and law as it ought to be.

How then has this reversal of the wheel come about? What are the theoretical errors in this distinction? Have the practical consequences of stressing the distinction as Bentham and Austin did been bad? Should we now reject it or keep it? In considering these questions we should recall the social philosophy which went along with the Utilitarians' insistence on this distinction. They stood firmly but on their own utilitarian ground for all the principles of liberalism in law and government. No one has ever combined, with such even-minded sanity as the Utilitarians, the passion for reform with respect for law together with a due recognition of the need to control the abuse of power even when power is in the hands of reformers. One by one in Bentham's works you can identify the elements of the *Rechtstaat* and all the principles for the defense of which the terminology of natural law has in our day been revived. Here are liberty of speech, and of press, the right of association, the need that laws should be published and made widely known before they are enforced, the need to control administrative agencies, the insistence that there should be no criminal liability without fault, and the importance of the principle of legality. . . . Some, I know, find the political and moral insight of the Utilitarians a very simple one, but we should not mistake this simplicity for superficiality nor forget how favorably their simplicities compare with the profundities of other thinkers. Take only one example: Bentham on slavery. He says the question at issue is not whether those who are held as slaves can reason, but simply whether they suffer. Does this not compare well with the discussion of the question in terms of whether or not there are some men whom Nature has fitted only to be the living instruments of others? We owe it to Bentham more than anyone else that we have stopped discussing this and similar questions of social policy in that form.

So Bentham and Austin were not dry analysts fiddling with verbal distinctions while cities burned, but were the vanguard of a movement which laboured with passionate intensity and much success to bring about a better society and better laws. Why then did they insist on the separation of law as it is and law as it ought to be? What did they mean? Let us first see what they said. Austin formulated the doctrine:

Whether or not ^{good} ~~good~~ ^{bael} ~~bael~~
 The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation. This truth, when formally announced as an abstract proposition, is so simple and glaring that it seems idle to insist upon it. But simple and glaring as it is, when enunciated in abstract expressions the enumeration of the instances in which it has been forgotten would fill a volume.

It is still a law even if we don't

Sir William Blackstone, for example, says in his "Commentaries," that the laws of God are superior in obligation to all other laws; that no human laws should be suffered to contradict them; that human laws are of no validity if contrary to them; and that all valid laws derive their force from that Divine original.

Now, he *may* mean that all human laws ought to conform to the Divine laws. If this be his meaning, I assent to it without hesitation. . . . Perhaps, again, he means that human lawgivers are themselves obliged by the Divine laws to fashion the laws which they impose by that ultimate standard, because if they do not, God will punish them. To this also I entirely assent.

But the meaning of this passage of Blackstone, if it has a meaning, seems rather to be this: that no human law which conflicts with the Divine law is obligatory or binding; in other words, that no human law which conflicts with the Divine law *is a law*. . . .³

Austin's protest against blurring the distinction between what law is and what it ought to be is quite general: it is a mistake, whatever our standard of what ought to be, whatever "the text by which we regulate our approbation or disapprobation."

Bentham insisted on this distinction without characterizing morality by reference to God but only, of course, by reference to the principles of utility. Both thinkers' prime reason for this insistence was to enable men to see steadily the precise issues posed by the existence of morally bad laws, and to understand the specific character of the authority of a legal order. Bentham's general recipe for life under the government of laws was simple: it was "*to obey punctually; to censure freely*."⁴ But Bentham was especially aware, as an anxious spectator of the French revolution, that this was not enough: the time might come in any society when the law's commands were so evil that the question of resistance had to be faced, and it was then essential that the issues at stake at this point should neither be oversimplified nor obscured. Yet, this was precisely what the confusion between law and morals had done and Bentham found that the confusion had spread symmetrically in two different directions. On the one hand Bentham had in mind the anarchist who argues thus: "This ought not to be the law, therefore it is not and I am free not merely to censure but to disregard it." On the other hand he thought of the reactionary who argues: "This is the law, therefore it is what it ought to be," and thus stifles criticism at its birth. Both errors, Bentham thought, were to be found in Blackstone: there was his incautious statement that human laws were invalid if contrary to the law of God,⁵ and "that spirit of obsequious *quietism* that seems constitutional in our Author" which "will scarce ever let him recognise a difference" between what is and what ought to be.⁶ This indeed was for Bentham the occupational disease of lawyers: "[I]n the eyes of lawyers — not to speak of their

³ AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 184-85 (Library of Ideas ed. 1954).

⁴ Bentham, *A Fragment on Government*, in 1 WORKS 221, 230 (Bowring ed. 1859) (preface, 16th para.).

⁵ 1 BLACKSTONE, *COMMENTARIES* *41.

⁶ Bentham, *A Fragment on Government*, in 1 WORKS 221, 294 (Bowring ed. 1859) (c. V, 10th para.).

dupes — that is to say, as yet, the generality of non-lawyers — the is and *ought to be* . . . were one and indivisible.”⁷ There are therefore two dangers between which insistence on this distinction will help us to steer: the danger that law and its authority may be dissolved in man’s conceptions of what law ought to be and the danger that the existing law may supplant morality as a final test of conduct and so escape criticism.

In view of later criticisms it is also important to distinguish several things that the Utilitarians did not mean by insisting on their separation of law and morals. They certainly accepted many of the things that might be called “the intersection of law and morals.” First, they never denied that, as a matter of historical fact, the development of legal systems had been powerfully influenced by moral opinion, and, conversely, that moral standards had been profoundly influenced by law, so that the content of many legal rules mirrored moral rules or principles. . . .

Secondly, neither Bentham nor his followers^{ex} denied that by explicit legal provisions moral principles might at different points be brought into a legal system and form part of its rules, or that courts might be legally bound to decide in accordance with what they thought just or best. . . .

What both Bentham and Austin were anxious to assert were the following two simple things: first, in the absence of an expressed constitutional or legal provision, it could not follow from the mere fact that a rule violated standards of morality that it was not a rule of law; and, conversely, it could not follow from the mere fact that a rule was morally desirable that it was a rule of law. . . .

II.

. . . Let us turn now to some of the criticisms. Undoubtedly, when Bentham and Austin insisted on the distinction between law as it is and as it ought to be, they had in mind particular laws the meanings of which were clear and so not in dispute, and they were concerned to argue that such laws, even if morally outrageous, were still laws. It is, however, necessary, in considering the criticisms which later developed, to consider more than those criticisms which were directed to this particular point if we are to get at the root of the dissatisfaction felt; we must also take account of the objection that, even if what the Utilitarians said on this particular point were true, their insistence on it, in a terminology suggesting a general cleavage between what is and ought to be law, obscured the fact that at other points there is an essential point of contact between the two. So in what follows I shall consider not only criticisms of the particular point which the Utilitarians had in mind, but also the claim that an essential connection between law and morals emerges if we examine how laws, the meanings of which are in dispute, are interpreted and applied in concrete cases; and that this connection emerges again if we widen our point of view and ask, not whether every particular rule of law must satisfy a moral minimum in order to be a law, but whether a system of rules which altogether failed to do this could be a legal system.

There is, however, one major initial complexity by which criticism has been much

⁷ Bentham, *A Commentary on Humphreys' Real Property Code*, in 5 WORKS 389 (Bowring ed. 1843).

confused. We must remember that the Utilitarians combined with their insistence on the separation of law and morals two other equally famous but distinct doctrines. One was the important truth that a purely analytical study of legal concepts, a study of the meaning of the distinctive vocabulary of the law, was as vital to our understanding of the nature of law as historical or sociological studies, though of course it could not supplant them. The other doctrine was the famous imperative theory of law — that law is essentially a command.

These three doctrines constitute the utilitarian tradition in jurisprudence; yet they are distinct doctrines. It is possible to endorse the separation between law and morals and to value analytical inquiries into the meaning of legal concepts and yet think it wrong to conceive of law as essentially a command. One source of great confusion in the criticism of the separation of law and morals was the belief that the falsity of any one of these three doctrines in the utilitarian tradition showed the other two to be false; what was worse was the failure to see that there were three quite separate doctrines in this tradition. The indiscriminate use of the label "positivism" to designate ambiguously each one of these three separate doctrines (together with some others which the Utilitarians never professed) has perhaps confused the issue more than any other single factor. Some of the early American critics of the Austinian doctrine were, however, admirably clear on just this matter. . . . But other critics have been less clearheaded and have thought that the inadequacies of the command theory which gradually came to light were sufficient to demonstrate the falsity of the separation of law and morals.

This was a mistake, but a natural one. To see how natural it was we must look a little more closely at the command idea. The famous theory that law is a command was a part of a wider and more ambitious claim. Austin said that the notion of a command was "the *key* to the sciences of jurisprudence and morals,"⁸ and contemporary attempts to elucidate moral judgments in terms of "imperative" or "prescriptive" utterances echo this ambitious claim. But the command theory, viewed as an effort to identify even the quintessence of law, let alone the quintessence of morals, seems breathtaking in its simplicity and quite inadequate. There is much, even in the simplest legal system, that is distorted if presented as a command. Yet the Utilitarians thought that the essence of a legal system could be conveyed if the notion of a command were supplemented by that of a habit of obedience. The simple scheme was this: What is a command? It is simply an expression by one person of the desire that another person should do or abstain from some action, accompanied by a threat of punishment which is likely to follow disobedience. Commands are laws if two conditions are satisfied: first, they must be general; second, they must be commanded by what (as both Bentham and Austin claimed) exists in every political society whatever its constitutional form, namely, a person or a group of persons who are in receipt of habitual obedience from most of the society but pay no such obedience to others. These persons are its sovereign. Thus law is the command of the uncommanded commanders of society — the creation of the legally untrammelled will of the sovereign who is by definition outside the law.

It is easy to see that this account of a legal system is threadbare. One can also

⁸ AUSTIN, *op. cit.* supra note [3], at 13.

see why it might seem that its inadequacy is due to the omission of some essential connection with morality. The situation which the simple trilogy of command, sanction, and sovereign avails to describe, if you take these notions at all precisely, is like that of a gunman saying to his victim, "Give me your money or your life." The only difference is that in the case of a legal system the gunman says it to a large number of people who are accustomed to the racket and habitually surrender to it. Law surely is not the gunman situation writ large, and legal order is surely not to be thus simply identified with compulsion.

This scheme, despite the points of obvious analogy between a statute and a command, omits some of the most characteristic elements of law. Let me cite a few. It is wrong to think of a legislature (and *a fortiori* an electorate) with a changing membership, as a group of persons habitually obeyed: this simple idea is suited only to a monarch sufficiently long-lived for a "habit" to grow up. Even if we waive this point, nothing which legislators do makes law unless they comply with fundamental accepted rules specifying the essential lawmaking procedures. This is true even in a system having a simple unitary constitution like the British. These fundamental accepted rules specifying what the legislature must do to legislate are not commands habitually obeyed, nor can they be expressed as habits of obedience to persons. They lie at the root of a legal system, and what is most missing in the utilitarian scheme is an analysis of what it is for a social group and its officials to accept such rules. This notion, not that of a command as Austin claimed, is the "key to the science of jurisprudence," or at least one of the keys.

Again, Austin, in the case of a democracy, looked past the legislators to the electorate as "the sovereign" (or in England as part of it). He thought that in the United States the mass of the electors to the state and federal legislatures were the sovereign whose commands, given by their "agents" in the legislatures, were law. But on this footing the whole notion of the sovereign outside the law being "habitually obeyed" by the "bulk" of the population must go: for in this case the "bulk" obeys the bulk, that is, it obeys itself. Plainly the general acceptance of the authority of a lawmaking procedure, irrespective of the changing individuals who operate it from time to time, can be only distorted by an analysis in terms of mass habitual obedience to certain persons who are by definition outside the law, just as the cognate but much simpler phenomenon of the general social acceptance of a rule, say of taking off the hat when entering a church, would be distorted if represented as habitual obedience by the mass to specific persons.

Other critics dimly sensed a further and more important defect in the command theory, yet blurred the edge of an important criticism by assuming that the defect was due to the failure to insist upon some important connection between law and morals. This more radical defect is as follows. The picture that the command theory draws of life under law is essentially a simple relationship of the commander to the commanded, of superior to inferior, of top to bottom; the relationship is vertical between the commanders or authors of the law conceived of as essentially outside the law and those who are commanded and subject to the law. In this picture no place, or only an accidental or subordinate place, is afforded for a distinction between types of legal rules which are in fact radically different. Some laws require men to act in certain ways or to abstain from acting whether they wish to or not. The criminal law consists largely of rules of this sort: like commands they are simply

"obeyed" or "disobeyed." But other legal rules are presented to society in quite different ways and have quite different functions. They provide facilities more or less elaborate for individuals to create structures of rights and duties for the conduct of life within the coercive framework of the law. Such are the rules enabling individuals to make contracts, wills, and trusts, and generally to mould their legal relations with others. Such rules, unlike the criminal law, are not factors designed to obstruct wishes and choices of an antisocial sort. On the contrary, these rules provide facilities for the realization of wishes and choices. They do not say (like commands) "do this whether you wish it or not," but rather "if you wish to do this, here is the way to do it." Under these rules we exercise powers, make claims, and assert rights. These phrases mark off characteristic features of laws that confer rights and powers; they are laws which are, so to speak, put at the disposition of individuals in a way in which the criminal law is not. Much ingenuity has gone into the task of "reducing" laws of this second sort to some complex variant of laws of the first sort. The effort to show that laws conferring rights are "really" only conditional stipulations of sanctions to be exacted from the person ultimately under a legal duty characterizes much of [Hans] Kelsen's work. Yet to urge this is really just to exhibit dogmatic determination to suppress one aspect of the legal system in order to maintain the theory that the stipulation of a sanction, like Austin's command, represents the quintessence of law. One might as well urge that the rules of baseball were "really" only complex conditional directions to the scorer and that this showed their real or "essential" nature. . . .

[C]ontinental critics of the Utilitarians, always alive to the complexity of the notion of a subjective right, insisted that the command theory gave it no place. [Axel] Hägerström insisted that if laws were merely commands the notion of an individual's right was really inexplicable, for commands are, as he said, something which we either obey or we do not obey; they do not confer rights. But he, too, concluded that moral, or, as he put it, common-sense, notions of justice must therefore be necessarily involved in the analysis of any legal structure elaborate enough to confer rights.

Yet, surely these arguments are confused. Rules that confer rights, though distinct from commands, need not be moral rules or coincide with them. Rights, after all, exist under the rules of ceremonies, games, and in many other spheres regulated by rules which are irrelevant to the question of justice or what the law ought to be. Nor need rules which confer rights be just or morally good rules. The rights of a master over his slaves show us that. "Their merit or demerit," as Austin termed it, depends on how rights are distributed in society and over whom or what they are exercised. These critics indeed revealed the inadequacy of the simple notions of command and habit for the analysis of law; at many points it is apparent that the social acceptance of a rule or standard of authority (even if it is motivated only by fear or superstition or rests on inertia) must be brought into the analysis and cannot itself be reduced to the two simple terms. Yet nothing in this showed the utilitarian insistence on the distinction between the existence of law and its "merits" to be wrong.

III.

I now turn to a distinctively American criticism of the separation of the law that is from the law that ought to be. It emerged from the critical study of the judicial process with which American jurisprudence has been on the whole so beneficially occupied. The most skeptical of these critics — the loosely named “Realists” of the 1930’s — perhaps too naïvely accepted the conceptual framework of the natural sciences as adequate for the characterization of law and for the analysis of rule-guided action of which a living system of law at least partly consists. But they opened men’s eyes to what actually goes on when courts decide cases, and the contrast they drew between the actual facts of judicial decision and the traditional terminology for describing it as if it were a wholly logical operation was usually illuminating; for in spite of some exaggeration the “Realists” made us acutely conscious of one cardinal feature of human language and human thought, emphasis on which is vital not only for the understanding of law but in areas of philosophy far beyond the confines of jurisprudence. The insight of this school may be presented in the following example. A legal rule forbids you to take a vehicle into the public park. Plainly this forbids an automobile, but what about bicycles, roller skates, toy automobiles? What about airplanes? Are these, as we say, to be called “vehicles” for the purpose of the rule or not? If we are to communicate with each other at all, and if, as in the most elementary form of law, we are to express our intentions that a certain type of behavior be regulated by rules, then the general words we use — like “vehicle” in the case I consider — must have some standard instance in which no doubts are felt about its application. There must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out. These cases will each have some features in common with the standard case; they will lack others or be accompanied by features not present in the standard case. Human invention and natural processes continually throw up such variants on the familiar, and if we are to say that these ranges of facts do or do not fall under existing rules, then the classifier must make a decision which is not dictated to him, for the facts and phenomena to which we fit our words and apply our rules are as it were dumb. The toy automobile cannot speak up and say, “I am a vehicle for the purpose of this legal rule,” nor can the roller skates chorus, “We are not a vehicle.” Fact situations do not await us neatly labeled, creased, and folded, nor is their legal classification written on them to be simply read off by the judge. Instead, in applying legal rules, someone must take the responsibility of deciding that words do or do not cover some case in hand with all the practical consequences involved in this decision.

We may call the problems which arise outside the hard core of standard instances or settled meaning “problems of the penumbra”; they are always with us whether in relation to such trivial things as the regulation of the use of the public park or in relation to the multidimensional generalities of a constitution. If a penumbra of uncertainty must surround all legal rules, then their application to specific cases in the penumbral area cannot be a matter of logical deduction, and so deductive reasoning, which for generations has been cherished as the very perfection of human reasoning, cannot serve as a model for what judges, or indeed anyone, should do in bringing particular cases under general rules. In this area men cannot live by deduction alone. And it follows that if legal arguments and legal decisions of

penumbral questions are to be rational, their rationality must lie in something other than a logical relation to premises. So if it is rational or "sound" to argue and to decide that for the purposes of this rule an airplane is not a vehicle, this argument must be sound or rational without being logically conclusive. What is it then that makes such decisions correct or at least better than alternative decisions? Again, it seems true to say that the criterion which makes a decision sound in such cases is some concept of what the law ought to be; it is easy to slide from that into saying that it must be a moral judgment about what law ought to be. So here we touch upon a point of necessary "intersection between law and morals" which demonstrates the falsity or, at any rate, the misleading character of the Utilitarians' emphatic insistence on the separation of law as it is and ought to be. Surely, Bentham and Austin could only have written as they did because they misunderstood or neglected this aspect of the judicial process, because they ignored the problems of the penumbra.

The misconception of the judicial process which ignores the problems of the penumbra and which views the process as consisting pre-eminently in deductive reasoning is often stigmatized as the error of "formalism" or "literalism." My question now is, how and to what extent does the demonstration of this error show the utilitarian distinction to be wrong or misleading? Here there are many issues which have been confused, but I can only disentangle some. The charge of formalism has been leveled both at the "positivist" legal theorist and at the courts, but of course it must be a very different charge in each case. Leveled at the legal theorist, the charge means that he has made a theoretical mistake about the character of legal decision; he has thought of the reasoning involved as consisting in deduction from premises in which the judges' practical choices or decisions play no part. It would be easy to show that Austin was guiltless of this error; only an entire misconception of what analytical jurisprudence is and why he thought it important has led to the view that he, or any other analyst, believed that the law was a closed logical system in which judges deduced their decisions from premises. On the contrary, he was very much alive to the character of language, to its vagueness or open character; he thought that in the penumbral situation judges must necessarily legislate, and, in accents that sometimes recall those of the late Judge Jerome Frank, he berated the common-law judges for legislating feebly and timidly and for blindly relying on real or fancied analogies with past cases instead of adapting their decisions to the growing needs of society as revealed by the moral standard of utility. The villains of this piece, responsible for the conception of the judge as an automaton, are not the Utilitarian thinkers. The responsibility, if it is to be laid at the door of any theorist, is with thinkers like Blackstone and, at an earlier stage, Montesquieu. The root of this evil is preoccupation with the separation of powers and Blackstone's "childish fiction" (as Austin termed it) that judges only "find," never "make," law.

But we are concerned with "formalism" as a vice not of jurists but of judges. What precisely is it for a judge to commit this error, to be a "formalist," "automatic," a "slot machine"? Curiously enough the literature which is full of the denunciation of these vices never makes this clear in concrete terms; instead we have only descriptions which cannot mean what they appear to say: it is said that in the formalist error courts make an excessive use of logic, take a thing to "a dryly logical

extreme," or make an excessive use of analytical methods. But just how in being a formalist does a judge make an excessive use of logic? It is clear that the essence of his error is to give some general term an interpretation which is blind to social values and consequences (or which is in some other way stupid or perhaps merely disliked by critics). But logic does not prescribe interpretation of terms; it dictates neither the stupid nor intelligent interpretation of any expression. Logic only tells you hypothetically that if you give a certain term a certain interpretation then a certain conclusion follows. Logic is silent on how to classify particulars — and this is the heart of a judicial decision. So this reference to logic and to logical extremes is a misnomer for something else, which must be this. A judge has to apply a rule to a concrete case — perhaps the rule that one may not take a stolen "vehicle" across state lines, and in this case an airplane has been taken. He either does not see or pretends not to see that the general terms of this rule are susceptible of different interpretations and that he has a choice left open uncontrolled by linguistic conventions. He ignores, or is blind to, the fact that he is in the area of the penumbra and is not dealing with a standard case. Instead of choosing in the light of social aims, the judge fixes the meaning in a different way. He either takes the meaning that the word most obviously suggests in its ordinary nonlegal context to ordinary men, or one which the word has been given in some other legal context, or, still worse, he thinks of a standard case and then arbitrarily identifies certain features in it — for example, in the case of a vehicle, (1) normally used on land, (2) capable of carrying a human person, (3) capable of being self-propelled — and treats these three as always necessary and always sufficient conditions for the use in all contexts of the word "vehicle," irrespective of the social consequences of giving it this interpretation. This choice, not "logic," would force the judge to include a toy motor car (if electrically propelled) and to exclude bicycles and the airplane. In all this there is possibly great stupidity but no more "logic," and no less, than in cases in which the interpretation given to a general term and the consequent application of some general rule to a particular case is consciously controlled by some identified social aim.

Decisions made in a fashion as blind as this would scarcely deserve the name of decisions; we might as well toss a penny in applying a rule of law. But it is at least doubtful whether any judicial decisions (even in England) have been quite as automatic as this. Rather, either the interpretations stigmatized as automatic have resulted from the conviction that it is fairer in a criminal statute to take a meaning which would jump to the mind of the ordinary man at the cost even of defeating other values, and this itself is a social policy (though possibly a bad one); or much more frequently, what is stigmatized as "mechanical" and "automatic" is a determined choice made indeed in the light of a social aim but of a conservative social aim. Certainly many of the Supreme Court decisions at the turn of the century which have been so stigmatized represent clear choices in the penumbral area to give effect to a policy of a conservative type. . . .

But how does the wrongness of deciding cases in an automatic and mechanical way and the rightness of deciding cases by reference to social purposes show that the utilitarian insistence on the distinction between what the law is and what it ought to be is wrong? I take it that no one who wished to use these vices of formalism as proof that the distinction between what is and what ought to be is